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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 785

HAROLD S. KAHM,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW YOUR PETITIONER HEREIN, and respectfully shows the Court pursuant to Rule 23 of Rules of the Supreme Court of the United States:

(a) That the only opinion delivered herein is the opinion affirming judgment dated February 24, 1961, of the United States District Court for the Southern District of Florida in the case of *Harold S. Kahm, Appellant, vs. United States of America, Appellee*, Case No. 18855, in the U. S. Circuit Court of Appeals for the Fifth Circuit, rendered and entered on the 9th day of February, 1962, written by Circuit Judge Pope from the Ninth Circuit sitting by designation. Other judges were Chief Judge Tuttle and Judge Gewin. (Citation unknown. See Appendix A.)

(b) That on February 9, 1962, the Fifth Circuit Court of Appeals affirmed the judgment of the conviction of your petitioner herein and entered same.

ii. That there were no orders respecting rehearing or granting an extension of time for Petition of Certiorari.

iii. That jurisdiction is conferred on this Court by Section 1254 of Title 28 U.S.C., Subsection (1), "Cases in the Circuit Court of Appeals may be reviewed by the Supreme Court by the following methods:

1. By Writ of Certiorari granted upon the Petition of any party to a civil or criminal case, before or after rendition of judgment or decree;"

(c) That the questions presented for review are as follows:

i. That your petitioner has been deprived of his constitutional right to freedom of speech (First Amendment, U. S. Constitution) by the judgment of the Fifth Circuit Court of Appeals herein affirming conviction on nine counts of sending obscene material and advertisements through the U. S mail.

ii. That your petitioner has been deprived of his right to Due Process (Fifth Amendment, U. S. Constitution): in that his conviction was allowed to stand when there was no evidence of obscenity in the government's case-in-chief and there was no evidence of scienter or mens rea other than the defendant's admission that he knew the contents of the material and the advertisements; in that the Court below did not require proof of specific intent as an element of the crime; in that the Court below refused to recognize and apply the legal requirements of burden of proof and presumption of innocence as the same have been heretofore established by prior decisions of this Court and by the common law of evidence; in that the definition of obscenity applied by the Court below is indefinite as it fails to provide a standard of conduct comprehensible to an ordinary person and that this Court in *Roth v. U. S.*, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d

1498, employed conflicting definitions of obscenity which prevented this defendant from knowing the charge that was being placed against him.

iii. That the Circuit Courts of Appeals have given conflicting holdings as to the meaning of 18 U.S.C. 1461. (See especially *Poss v. Christenberry* (D.C. N.Y., 1959), 172 Fed. Supp. 411, and *U. S. v. Harnick* (C.A. Penn., 1959), 229 F.2d 120.)

That the case of *Smith v. People of California* (1959), 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205, in this Court is seemingly in conflict with the case of *Rosen v. U. S.*, (1896), 161 U.S. 29, which in turn seems to be in conflict with *Tot v. U. S.* (1943), 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519; *Morissette v. U. S.* (1951), 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288; *Speiser v. Randall* (1958), 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460.

That state Supreme Courts have found under constitutions similar to ours the term "obscene" to be too indefinite (see *State v. Christine*, 239 La. 259, 118 So.2d 403 (1960); *State v. Nelson*, 168 Neb. 394, 95 N.W.2d 678, 681; *Commonwealth v. Blumenstein*, 396 Pa. 417, 153 A.2d 227.)

That further conflicts have appeared relative to the question of whether or not the community standards to be applied are those of the nation or of the locality in which prosecution is commenced.

iv. That this Court erred in the case of *Roth v. U. S.* (cited supra) in that it apparently holds obscenity to be a matter of fact and this amounts to a deprivation of a Constitutional guaranteed freedom without Due Process of law in that neither Congress nor this Honorable Court has the right to delegate a Constitutional determination to a jury.

v. That your petitioner herein was deprived of his right to Due Process by the proceedings had herein in that he was

allowed to send the material in question under government surveillance through the U. S. mails for two years, further in that he had no way to ascertain prior to jury verdict whether or not his material was obscene and that as such a conviction under these circumstances amounts to the application of ex post facto law or a bill of attainder. (See *Lambert v. California* (1957), 355 U.S. 235, 78 S.Ct. 240, 2 L.Ed.2d 228; *U. S. v. Petrillo*, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L.Ed. 1877; *Winters v. People of State of New York*, 33 U.S. 507, 68 S.Ct. 665, 92 L.Ed. 840.)

vi. That your petitioner was deprived of his right to Due Process by the Fifth Circuit Court of Appeals in that the said Court of Appeals in upholding the conviction ignored the unqualified and uncontradicted opinions of expert witnesses on both sides that the material in question was not obscene when the tests laid down in the *Roth* case are at very best matters of expert knowledge; that further the petitioner was deprived of Due Process by said Circuit Court of Appeals in that the review of the evidence of said Court was conducted in an atmosphere of subjective prejudice as is manifested in the following citations of the Court's opinion to be found in Appendix A attached hereto:

Page 11, lines 7-11, 18-23;
Page 12, lines 1-9;
Page 14, line 20 - Page 15, lines 1 and 2;
Page 15, line 18 - Page 16, line 3;
Page 17, lines 3-15;
Page 18, lines 6-9;
Page 19, lines 3-16.

Refusal of the said Court to consider Constitutional issues, refusal to review convictions under Counts 2, 3, 4, 6, 7 and 10, and that the said Circuit Court of Appeals did not understand and misapplied the holdings of *Roth v. U. S.*, cited

supra; *Smith v. People of California*; *Speiser v. Randell*, all cited supra; and *Kingsley Int'l Pictures Corp. v. Regents of Univ. of N. Y.* (1959), 360 U.S. 684, 79 S.Ct. 1362, 3 L.Ed. 2d 1512.

vii. The implication of this Court's decision in *Roth v. U.S.*, cited supra, amounts to judicial legislation and as such are contrary to the separation of principles doctrine of the Constitution and are violative of defendant's right to Due Process.

viii. The statute in question herein, Section 1461 of 18 *U.S.C.*, is unconstitutional and is not severable (*Carter v. Carter Coal Co.* (1936), 56 S.Ct. 855, 298 U.S. 238, 80 L.Ed. 1160) in the following regards:

(a) Statute attempts to regulate matters other than obscene matters such as contraception, arson, advertising and words other than obscenity;

(b) Provides no legally ascertainable standard as men and women cannot be averaged in their reaction to or interpretation of material dealing with sex;

(c) In that it deprives a citizen of his right to read;

(d) In that without the prior determination of obscenity it is in the nature of an ex post facto law or bill of attainder.

(d) The Constitutional provisions and statutes involved are:

United States Constitution:

Article I, Section 1;

Article I, Section 9 (Clause 3);

Article III, Section 1;

Article IV, Section 2.

United States Constitution, Amendments I, V, VI, IX and X.

18 *U. S. Code*, Rules of Criminal Procedure, Rule 26, Citation, Sections 107 and 108.

18 *U. S. Code* 1461.

39 *U.S.C.* 259, Subdivisions a and b.

(e) That the following is a concise statement of the case and facts; that this is a criminal prosecution originally on ten counts, subsequently reduced at trial to nine. All counts of the original indictment (R. 2-7; R. 422-423) allege violation of Section 1461, Title 18, *United States Code*. Two counts of said indictment allege mailing of obscene matter. The remaining eight counts allege mailing of advertisements:

> "giving information as to where, how and from whom obscene * * *"

matter can be obtained.

Defendant pleaded not guilty to all counts.

At the trial (R. 178-185) the Government moved to dismiss the two obscene matter counts (i.e., Counts 8 and 9) and Count 1 having to do with advertising. The Court granted the Government's motion as to the advertising count (Count 1) but refused it as to Counts 8 and 9 (substantive counts). The reasoning of the trial judge in support of this ruling was abstruse to both counsel (see especially the statement by the Court—R. 182).

This is a case wherein only three elements were to be proved by the United States Government.

A. That the material constituted (R. 56, Indictment Counts 8 and 9)

> "obscene, lewd and filthy pamphlets, writings and publications of an indecent character, the language of which were and are so obscene, lewd, filthy and indecent that the same would be offensive to the Court here and improper to be placed upon the records thereof, wherefore grand jurors do not set forth the same in this Indictment * * *"

B. That (R. 2-5, Indictment Counts 2 through 7 and 10) the advertisements gave information as to where, how and from whom obscene, lewd, and filthy pamphlets and publications of an indecent character might be obtained; and

C. That the defendant had the requisite mens rea or scienter to be convicted for his acts.

As the Government viewed the case (R. 178-179) their burden of proof "beyond a reasonable doubt" was met when they introduced the material and advertisements into evidence. (There is no issue as to mailing.) The defendant having admitted the mailing of the material alleged in Counts 2 through 7 and 10. The defendant denied that said material was obscene and that the advertisements gave information as to where obscene material could be obtained. He further denied that he had a criminal intent in his actions.

The Government contended that no proof of obscenity was required relative to Counts 2 through 7 and 10 (R. 180), as well as no mens rea other than what the defendant admitted, i.e., knowledge of the material (R. 181). The Government went further to contend that whether or not the material sent in response to the advertising was obscene, or whether any literature was in fact sent, was *immaterial* (R. 180). At this point the Government's theory of the burden of proof becomes nebulous. Apparently their contention is that mere introduction of the advertisements is a prima facie criminal case (R. 178-179).

The Government, also by implication, took the position relative to the so-called substantive counts (8 and 9) that after introduction of the literature in question, without any further probative evidence, the burden of proof shifted to the defendant.

As much of a definitive statement of what the United States Attorney considers his burden of proof to be (R. 178-179) is made when he says:

> "• • • the Government is going to abandon Counts 8 and 9 and proceed on the basis of advertising • • •. We do that with the understanding that we will no longer need to bring in a psychiatrist or psychologist or go into any lengthy deal as to the proof of what constitutes obscenity and such things as that. We are going to rely on the basis of advertising alone • • • whether they had obsence matters or not was not important, which, of course, is what we maintain the law is" (see also R. 180-181).

At any rate, no proof was offered by the United States Government during its case-in-chief as to community standards, as to obscenity, as to advertisements or as to what would come in response to the advertisements of any nature whatsoever during the prosecution's case-in-chief. In essence then, the United States Government offered no proof of obscenity whatsoever.

The United States Government in its case-in-chief called thirteen witnesses from various parts of the country (R. 30-216). They testified in essence that they had received or caused to be received certain advertisements and material through the United States mails, mailed by the defendant herein. One witness read at length from the defendant's writings; an employee of Brinks, Inc., testified as to the commercial aspects of the case. No evidence of obscenity was introduced by the Government.

The defendant in this case is a professional writer who has enjoyed fair success in the field of literature for over thirty years and has published several books and hundreds of magazine articles on a multitude of subjects including sex and religion (R. 227-229). These books and articles have been published by major companies and national magazines (R. 220-223). The defendant's books are on the library shelves in schools, colleges and public libraries throughout the country (R. 221). The defendant is an authority on

literature and writing material presently extant in this country (R. 229). He has taught magazine writing at the University of Minnesota's Department of Journalism for a period of time in excess of ten years (R. 223) and has been a member for many years of the internationally famous Author's League of America which counts as its members the leading authors of our nation. Kalin possesses a deep and penetrating understanding of sex (R. 227-233). He has religious beliefs which justify, nay, extoll, open discussion and understanding of sexual matters (R. 316-329).

The defendant commenced sending the material and advertisements involved in this case through the United States mails from the City of Orlando, Florida, in 1958 and continued this with Government knowledge and tacit approval until his arrest in May of 1960 (R. 141, 215). At no time was Kalin told to stop nor was postal administrative machinery employed in any way (R. 141) prior to his arrest and charge in three jurisdictions contemporaneously (R. 351). (Although the postal inspectors were fully appraised of the material for two years prior to arrest (R. 140).)

The head of the Department of Sociology and Anthropology at Rollins College in Winter Park, Florida, Dr. Dudley DeGroot (R. 249), and a local psychiatrist, called by the prosecution in rebuttal only, both testified that the material and advertisements in the bill of particulars are well within the area of readily available printed material at newsstands throughout the country and have appreciably less sexual stimulating power than other publications commonly and readily available (R. 253-259; 412-414, 418, 420).

Federal jurisdiction is invoked in this case, in the first instance, as this was simply a prosecution under a Federal criminal statute.

(f) That this is not applicable to this petitioner, under Sup. Ct. Rule 23 (Subd. F).

(g) That this is not applicable to this petitioner, under Sup. Ct. Rule 23 (Subd. G).

(h) That the following is a direct and concise argument amplifying the reasons relied on for the allowance of this writ:

This Court's opinion in the *Roth*, in the *Smith*, and in the *Kingsley* cases (cited supra) left some very serious questions unanswered and created some new ones. In the *Roth* case, U. S. Supreme Court ignored the words of 90 per cent of the statute in sustaining its constitutionality. As a result, prosecutions under the advertising and obscenity provisions of said statute have created extreme conflicts in the Circuit Courts of Appeals. (See *U. S. v. Hagnick* case and *Poss v. Christenberry* cited supra.)

None of the three aforementioned cases established clearly a difference between writings on sex and writings that are obscene. We have strong divergences of concepts of obscenity when we apply the Bible-belt reasoning of the Fifth Circuit Court of Appeals to the mundane, sophisticated reasoning of the Circuit Courts of Appeals covering the City of New York and that covering the City of Los Angeles.

All three of the aforementioned cases fail to indicate what degree of proof, if any, was required under the Due Process clause of the Constitution in establishing a prima facie case of obscenity.

None of the three aforementioned cases established what degree of scienter must be proved by the prosecution as a matter of Due Process.

None of the three cases above established whether or not a presumption of protection of free speech applies to the material in question or whether, as the Government seems to indicate in recent prosecutions, there was a presumption of

obscenity. This appears to be clearly a violation of Due Process.

None of the three cases above cited established whether or not prior notice of any sort is required as a matter of Due Process in obscenity prosecutions.

None of the three decisions aforementioned clearly gives the public an understandable standard of conduct, for all sociologists, psychiatrists, and psychologists agree that written material cannot be interpreted by any average or combination of men and women as to its prurient value for the reactions of males and females are completely divergent and it is further clear from the language of Section 1461 of Title 18 that Congress' basic intent was to go well beyond the word obscene in its attempt to regulate speech contrary to the First Amendment by including in such statute other words such as contraception, arson, advertising, vile, and that the sustaining of this statute by this Court amounted to a re-writing of the statute or judicial legislation which is theoretically contrary to the constitutional provisions of Separation of Powers.

The Circuit Court of Appeals in this case, in sustaining the conviction on the proof offered by the United States Government, in effect, tacked onto the First Amendment to the U. S. Constitution a res ipsa loquitur doctrine of obscenity in invisible ink: (i.e., establishing a presumption of obscenity).

Clearly, unless obscenity can be found by the trial judge to exist as a matter of law the case should not be allowed to go to a jury. To hold otherwise would in effect be to acknowledge that the Constitution is not a uniform instrument applying equal protection to all, but rather an instrument which varies with the prejudices of local communities. The same argument applies with equal force to requiring national community standards for a base of proof. To allow prose-

cutions under a national obscenity statute without prior determination of obscenity in effect places a bill of attainder upon every writer in the field of sex or acts as an ex post facto law in that under the present holdings of this Court material is not obscene until a jury decides it is. The refusal of the Circuit Court of Appeals to grant weight to uncontradicted opinions of experts indicates the degree to which Due Process can be flaunted when we are dealing in an area of emotionalism rather than in an area of acts and facts.

The U. S. Government failed to introduce any evidence whatsoever of a mens rea or guilty mind. All the evidence is to the contrary.

While the violation of Due Process is of great importance to the country as a whole, it is equally important that this case be reviewed by the Court for the purpose of clearly determining with a precise legal analysis of Section 1461 of Title 18 *U. S. Code* whether or not that statute is constitutional in its entirety, and if it is constitutional, what are the ground rules of a prosecution under it so that a defendant can properly prepare his defense and so that the citizens of this country can properly govern their lives? If this Court is going to reaffirm this statute as constitutional, it must clearly acknowledge that it is re-writing the statute, and this Court should define obscenity in clear terms. This Court should decide what degree of guilty mind or scienter is required to sustain a conviction. The American public has the right to know the answers to these questions, for the *Roth* case gave as much impetus to censorship activities in our country as the upholding of the Blue Laws by this Court did in stimulating the various law-making bodies throughout the United States to suddenly decree "no business on Sunday."

Citizens do not understand fine, involved, Harvard type legal distinctions. Such indefinite holdings by this Court have the unintended effect of depriving citizens of our na-

tion of their most precious personal freedoms, for today in America too often the vigilant are not those who would preserve our rights but those who would deprive us of our rights.

Wherefore, your Petitioner prays that a Writ of Certiorari issue and that this case be reviewed on such Writ.

Respectfully submitted,

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Petitioner

and

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APPENDIX B

United States Constitution

Article I, Section 1.

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.

Article I, Section 9, Clause 3.

> No Bill of Attainder or ex post facto Law shall be passed.

Article III, Section 1.

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.

Article IV, Section 2.

> The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens of the several States.

Constitutional Amendments

Amendment (I)

> Congress shall make no law * * * abridging the freedom of speech, or of the press; * * *

Amendment (V)

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

Amendment (VI)

> In all criminal prosecutions, the accused shall * * * be informed of the nature and cause of the accusation; * * *

Amendment (IX)

> The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Amendment (X)

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

18 *U.S.C.* 1461.

Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and

Every article or thing designed, adapted, or intended for preventing conception or producing abortion, or for any indecent or immoral use; and

Every article, instrument, substance, drug, medicine, or thing which is advertised or described in a manner calculated to lead another to use or apply it for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, or where, or by whom, any act or operation of any kind for the procuring or producing of abortion will be done or performed, or how or by what means conception may be prevented or abortion produced, whether sealed or unsealed; and

Every paper, writing, advertisement, or representation that any article, instrument, substance, drug, medicine, or thing may, or can, be used or applied for preventing conception or producing abortion, or for any indecent or immoral purpose; and

Every description calculated to induce or incite a person to so use or apply any such article, instrument, drug, medicine, or thing—

Is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.

Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than

$5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than 10 years, or both, for each such offense thereafter.

The term "indecent," as used in this section, includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190, ss. 1, 2, 69 Stat. 183; August 28, 1958, Pub. L. 85-796, s. 1, 72 Stat. 962.

18 *U.S. Code*, Rules of Criminal Procedure, Rule 26. Evidence.

* * * The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

39 *U.S.C.* 259, subdivisions a and b:

Upon evidence satisfactory to the Postmaster General that any person, firm, corporation, company, partnership or association is obtaining or attempting to obtain remittances of money or property of any kind through the mails for any obscene, lewd, lascivious, indecent, filthy, or vile article, matter, thing, device or substance, or is depositing or is causing to be deposited in the United States mails information as to where, how or from whom the same may be obtained, the Postmaster General may

(a) instruct postmasters at any post office at which registered letters or any other letters or mail matter arrive directed to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnerships, or association, to return all such mail matter to the postmaster at the office at which it was originally mailed, with the word "Unlawful" plainly written or stamped upon the outside thereof, and all such mail matter so returned to such postmasters shall be by them returned to the senders thereof, under such regulations as the Postmaster General may prescribe; and

(b) forbid the payment by any postmaster to any such person, firm, corporation, company, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, of any money order or postal note drawn to the order of such person, firm, company, corporation, partnership, or association, or to the agent or representative of such person, firm, corporation, company, partnership, or association, and the Postmaster General may provide by regulation for the return to the remitters of the sums named in such money orders or postal notes. Aug. 16, 1950, c. 721, 64 Stat. 451.

Appendix A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 18855

HAROLD S. KAHM,

Appellant,

versus

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(February 9, 1962)

Before TUTTLE, Chief Judge, POPE* and GEWIN, Circuit Judges.

POPE, Circuit Judge: Appellant was convicted under an indictment returned in the court below charging him in ten counts with violation of §1461 of Title 18 U.S.C. Eight of the ten counts charged the knowing use of the mails for the delivery of advertisements giving information as to where, how and from whom obscene, lewd and filthy writings and publications of an indecent character might

*From the Ninth Circuit, sitting by designation.

be obtained. Two counts, (counts 8 and 9), charged him with knowingly causing to be deposited for mailing and delivery in the United States mails certain envelopes containing obscene, lewd and filthy pamphlets, writings and publications of an indecent character.

Appellant pleaded not guilty. Count 1 was dismissed but after trial by jury, appellant was found guilty on all of the remaining nine counts. He was sentenced to imprisonment for a period of five years on each count, the sentences to run concurrently. The prison sentence was suspended and he was placed on probation.

Upon this appeal the principal contention made is that the evidence was insufficient to sustain the verdict. While appellant's specification lists certain asserted errors in the admission or exclusion of evidence, and in the instructions to the jury, appellant specially emphasizes his position that such listed errors are mentioned only as a basis for his claim that the judgment should be reversed and the cause dismissed; — that he does not seek and does not wish a new trial.[1]

In the course of the Government's case, proof was made of the mailing of the various matters charged in counts 2 to 10 inclusive. In respect to counts 8 and 9, these were the alleged obscene writings; as to the other counts, the proof was of the advertisements which were alleged to have

[1]Says the appellant: "NOTE [sic] BENE: The following errors are urged *only* insofar as they bear on a reversal of the judgment herein. They are not intended to bear in any way upon the issue of whether or not a new trial should be granted. This appellant cannot afford, nor does he wish, a new trial. For purposes of the appeal, the sole relief prayed for is a reversal of the judgment and discharge of this defendant from all charges."

given information as to where, how and from whom the obscene, lewd and filthy pamphlets and publications might be obtained. There is no question as to the fact of mailing nor that the mailing was done by the appellant; and that he knew the contents and character of the transmitted material, for he admitted the mailing and knowledge of its contents. He himself selected it or wrote it and had it printed.

With respect to the advertisements referred to in seven of the nine counts on which appellant was convicted, appellant says that the Government failed to make a case in that it was not proven that the advertisements themselves were obscene; that it was not shown what, if anything, was sent in response to those advertisements, nor that obscene material was so sent.

As will be noted shortly, we find it unnecessary in this case to determine whether the Government's proof with respect to these seven counts was sufficient. If the case of *United States v. Hornick*, 3 cir., 229 F. 2d 120, was correctly decided, then most of appellant's contentions with respect to the failure to prove what was sent in response to these advertisements would appear to be without validity.[2] The record does not sustain appellant's assertion that there was no proof that obscene matters were offered in the advertise-

[2] "We do not think it is necessary that representations made in these advertisements be true. The statute says 'advertisement • • • giving information'. The statute does not say that the advertisement must be true or that the information must be accurate. What is forbidden is advertising this kind of stuff by means of the United States mails. We think that the offense of using the mails to give information for obtaining obscene matter is committed even though what is sent in response to the advertisement to the gullible purchasers is as innocent as a Currier and Ives print or a Turner landscape." (p. 122)

ments or that such were sent, or intended to be sent, to those who answered [3]

[3]The advertisements here in question advise that the readers could obtain "a formerly banned course" on "sex for single men" stated to be a course that tells "everything a single man needs to know to enjoy a full and satisfying sex life before marriage." Some of the lessons were listed as follows:

"Women who crave male love
"Where to find prostitutes
"Homosexuality
"Mutual masturbation
"How to arouse female passion
"Positions for intercourse
"Starting a Sex Club
"Techniques of seduction
"Why women 'tease' men
"How to overcome resistance"

The statement is made that the course had previously been sold for an established price of $29.95 but for a limited time it could be had for $4.95. An order coupon was attached.

Also offered in the advertisement were "Special Publications, For Men Only" which contained brief descriptions of some offered articles or documents. These documents are described as follows:

"*The Art of Seduction* This is the notorious Formula 14 which is the result of years of secret research by a group of college psychologists who were kicked out of the university when the scandalized authorities discovered what they were up to. Formula 14 tells exactly what to say to a woman, what to do, to arouse her barest passions and to cause her to submit to your manly desires. (10-day money back guarantee) Only $1.

"*Sex Tortures* From ancient times to this very day sex tortures of the most horrible kind have been inflicted upon the helpless, bound, naked bodies of male and female victims. All described in picture-clear detail. Don't order this unless you have a strong stomach. (Absolutely not sold to minors) Satisfaction or refund in 10 days. Price $2.00.

"*Stag Limericks* 'There was an old maid from St. Paul
'Who went to a birth control ball'

And so on. You know the kind we mean? 14 of the best from a famous private collection. You'll agree they're strictly for adults only. Price only $1.

"*Sack's Book Reviews* Censors turn purple and bawl for the police when they discover the sizzling hot pages concealed among the 80,000 words of many seemingly innocent novels. The authors haven't missed a trick: rape, seduction, homosexuality, Lesbianism, perversions, gang orgies, wrestling, kicking, biting, whipping, caressing, beating, moaning — all the writhing, bare bedroom facts of life in heartpounding detail are here. Should these books be banned? Judge for yourself! Price only $2.00.

"*Whizbangs* You'll get a terrific bang out of these very naugh-

The evidence offered in support of counts 8 and 9, which we shall describe hereafter, discloses what appellant actually did mail; and it is shown to be the very material described in the portion of the advertisement just quoted.

We note, however, that appellant is not in a position to argue the insufficiency of the evidence as to the advertising counts, for, as will presently appear, we hold that the evidence on counts 8 and 9 was sufficient to sustain his conviction on those counts. Since the sentences upon all counts run concurrently with the sentences on counts 8 and 9, it is unnecessary for us to consider the contentions as to the insufficiency of the evidence on the advertising counts. *Sinclair v. United States*, 279 U. S. 263 at 299; *Hirabayashi v. United States*, 320 U. S. 81; *Lawn v. United States*, 355 U. S. 339, 359; *Pinkerton v. United States*, 328 U. S. 640; *Rogers v. United States*, 5 cir., 128 F. 2d 973, 974; *Morris v. United States*, 5 cir., 128 F. 2d 912, 916.

An examination of the material mailed by appellant under the circumstances charged in counts 8 and 9 discloses that it was of such character as to permit the jury to find that substantially all of the material was plainly obscene within the definition of that term in *Roth v. United States*, 354 U. S. 476, 487. As there stated: "Obscene material is material which deals with sex in a manner appealing to

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ty, very funny quips, cracks and zippy little tales. Only $1."

The advertisements also offered to furnish any purchaser of these materials a card identifying him as an interviewer for the "Florida National Research Council" referred to as "F.N.R.C." The advertisement stated that the recipient of this card could use it to obtain interviews with women to whom he could represent himself as a researcher seeking information as to the sex life of the interviewee. The advertisement stated that such interviews could lead to an acquaintance resulting in a "sizzling hot friendship".

prurient interest." The Court adds in a footnote: "I.e., material having a tendency to excite lustful thoughts. Webster's New International Dictionary (Unabridged, 2d ed., 1949) defines prurient, in pertinent part, as follows: ' . . . Itching; longing, uneasy with desire or longing; of persons, having itching, morbid, or lascivious longings; of desire, curiosity, or propensity, lewd . . .' Pruriency is defined, in pertinent part, as follows: ' . . . Quality of being prurient; lascivious desire or thought . . .'"

The two batches of material mailed as charged in counts 8 and 9 were identical. Included under the heading of "Sack's Book Reviews" are a number of brief extracts purportedly taken and quoted from books by named authors. These are not book reviews in the ordinary sense but merely quotations of particularly salacious passages in the books. One is a passage purportedly lifted from the book "Peyton Place" by Grace Metalious. Here are the passages containing a vivid description of the accomplishment of sexual intercourse between a boy and a girl.[4] We take it for granted that a motion picture which portrayed the consummation of a sexual act would be obscene. This mailed

[4]Both were lying naked on the ground near his automobile. At first she teases him by running away and getting into the automobile, and laughing at him when she turns the car light on him to outline his nakedness. He pulls on his trousers, climbs into the car and starts the car engine when the girl turns off the ignition and immediately changes her mood to one of endearment and seduction, running her hands over his body and seeking his kisses. She then leads him down to the beach where he followed with the car robe on which they fall and embrace. What then happens is described by the author in words of impatient urging of immediate ravishment; — words which vividly portray a breathless, panting, concupiscent, cacoethes for consummation on the part of the girl, and savage eagerness on the part of theeboy. Their lustful words, their sensuous body embrace are told with realistic and dramatic vividness to the point of passionate ecstacy that immediately precedes coitus.

portion of an extract from Peyton Place is no less obscene in the sense of the definition of the Roth case.

The manner in which the appellant selected and published the extract just described and the other similar extracts to which we shall shortly allude, makes it plain that the Government here had no difficulty in meeting an additional standard for testing the type of obscenity which Congress may validly exclude from the mails. In Roth the Court rejected the earlier standard under which obscenity could be judged by the effect of an isolated excerpt taken from a book or other writing. The proper standard, the Court said, was used in the instructions given by the trial court in the Roth case. There the jury was told that "the test of each case is the effect of the book, picture or publication considered as a whole. . . ." Had the appellant undertaken to send through the mail the book "Peyton Place" a different problem would be presented, for then inquiry would have to be made as to whether, notwithstanding the fact that the book contained passages of the kind here referred to, "to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest". No such question is presented to us here for the appellant in merely selecting the most obscene passages from various books has seen to it that his readers are not subjected to any book as a whole.[5]

The appellant cannot assert that such salacious extracts

[5]The entire book such as "Peyton Place" might serve a useful purpose and have value in portraying the life of a community whose people have become obsessed with sex; or it might be a useful study in the psychology and mental processes of the author

have "the slightest redeeming social importance." He was furnishing his readers only "smut for smut's sake"; and consideration of the other extracts and enclosures but serves to confirm that view and to demonstrate that the mailed material "taken as a whole" served no purpose whatever except to purvey obscenity.[6]

The extract from Peyton Place was accompanied by other so-called "book reviews" which were merely salacious extracts from other named books. One of these salacious extracts was taken from a book entitled "Out For Kicks" Our description of the obscene passages from Peyton Place fits this one precisely, as it does one from a book entitled "The Immortal" and still another from a purported "Nine Days to Mukalla."

Other material enclosed in the envelopes described in counts 8 and 9 may well be classified as hard-core pornography, a term we discuss hereafter. Among the so-called book reviews is a purported extract from a book entitled "The Tribe That Lost Its Head". This is a description of a savage tribal rite which the extract characterizes as loathsome and degraded.[7] Another purported extract is

[6] It is true that the parcels contained some matters that are too trivial, inane, banal and insipid to require serious consideration. These are the matters which were advertised as "stag limericks" and "whiz bangs". (Footnote 3, supra) These are composed of the sort of remarks commonly written on privy walls by mental defectives. When the jury read these they could hardly have credited that part of the appellant's testimony in which he asserted that he had been a serious author or a college professor. However these portions of the enclosures may be characterized, they certainly added no "redeeming social importance" to the transmitted literature.

[7] In this rite a "naked comely girl" continues to "stroke and touch" a male youth who was "lathered with excitement" until the youth, his secret parts all exposed, reached the stage of ejaculation and the emission caught in a bowl.

from a book called "Intimacy"; it describes with unblushing detail both homosexual activity and masturbation. From "The Bitter Weed Path" and "Shadows of Shame" are taken descriptions of homosexual embraces. Enclosed in the same parcel of material is a discussion of "Sex Tortures", including, with numerous other descriptions of revolting procedures, an account of "punitive masturbation" and "gang rape". Also in the mailed material is a copy of what was referred to in the advertisement as "Formula 14". This is an extended description of how a man may go about meeting a woman, gradually awakening her interest, and finally seducing her.*

We need not speculate on whether since the Court held in *Kingsley Pictures Corp. v. Regents*, 360 U.S. 684, 689, that the Constitution "protects advocacy of the opinion that adultery may sometimes be proper"; it also protects the circulation of detailed instructions on how to accomplish adultery, fornication or seduction. For the mere fact, if it be a fact, that some non-obscene materials was included in these packages would not serve to make the whole mass mailable or protect the appellant from prosecution.[9]

Appellant contends that the Government made no case for the jury because no witnesses were called to testify or give their opinions as to whether the mailed material here

* THE KILL: Soft lights, soft music, plenty of liquor and 'Darling, I love you.' Now your hands can do a little very gentle exploring. If as you proceed you get no serious opposition, be sure she's really in the mood before going farther. Take your time! She must be fully aroused! Wait until she is panting for it! And then, very, very slowly, very very gently . . .

[9] Flying Eagle Publications, Inc. v. United States, 1 Cir., 285 F. 2d 207, 308. "An obscene picture of a Roman orgy would be no less so because accompanied by an account of a Sunday School picnic which omitted the offensive details."

in question would come within the definition of obscene material stated in Roth. The argument is the merely introducing proof that the material was mailed, proving its contents and that such contents were known to the appellant, was not enough. It seems to be appellant's theory that some qualified witness must be produced to furnish expert testimony was to the effect this material would have upon the average person, applying contemporary community standards, and whether to such a person this material would have an appeal to prurient interest. It is argued that without that proof and proof as to what were the contemporary community standards there was no case for the jury.

We do not suggest that such testimony would not have been appropriate or admissible; or that the appellant, if he chose to do so, could not have offered evidence upon the same subject. In his concurring opinion in *Smith v. California*, 361 U.S. 147, at pp. 160 and 161, Mr. Justice Frankfurter condemned the exclusion of appropriately offered testimony regarding "the prevailing literary standards and the literary and moral criteria by which books relevantly comparable to the book in controversy are deemed not obscene." But such a situation did not arise here. Appellant was permitted to call as his witness a professor of physiology and anthropology who testified freely and completely. He was also allowed to introduce in evidence the Kinsey report on "Sexual Behavior in the Human Male", and a substantial number of publications and magazines for the purpose of demonstrating that his material was no worse than many other writings available to the public.

It is plain to us that when the jury was instructed by the trial court in language such as that approved by the Su-

preme Court in the Roth case, it was fully capable of applying those standards and that charge to the materials shown to have been mailed here. Nothing is more common than for a jury in a case involving charges of negligence, as for example negligent homicide, to determine whether the proven conduct measures up to the standards of a reasonably prudent man. We think it may fairly be said that no amount of testimony by anthropologists, sociologists, psychologists or psychiatrists could add much to the ability of the jury to apply those tests of obscenity to the materials here present.[10]

It must be recalled that we are not dealing here with the problem of what happens when a defendant is charged with improper mailing of an entire book in which the literary, artistic or social values of the work must be considered and weighed against certain off-color passages to determine whether the latter are so dominant as to outweigh the other features of the work as a whole. In a case of that kind expert testimony could well be of some value to the jury; but here, where everything mailed is in its entirety lewd and salacious, with no possible redeeming feature about it, the jury was fully qualified to determine whether the material came within the definitions given to them by the court.

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[10]Judge Learned Hand has had occasion to comment on a jury's competence to apply standards of this kind. In United States v. Kennerley, (D C S D N Y) 209 F 119, 121, he said: "If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem, that a jury should in each case establish the standard much as they do in cases of negligence." In United States v. Levine, 2 cir., 83 F 2d 156, 157, he said: "Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor premise, but really a small bit of legislation ad hoc, like the standard of care."

Appellant's expert witness expressed the view that the material here in question was not "hard core pornography", and appellant suggests that hence it is not within the definition of obscenity stated in Roth. If the question of whether this was "hard core pornography" were dispositive of this case, the court and jury were not required to credit or accept the witness' statement. We think he was manifestly wrong as to portions of the material. It is plain that Roth was defining obscene materials in terms which make it manifest that the Court was including material other than "hard core pornography".

The Roth case, while necessarily giving the general definition of "obscenity" previously referred to, did not have occasion to pass upon the obscenity of the material involved in that case and in the case of *Alberts v. California* which was disposed of in the same opinion. As noted by the Court in its footnote 8, "No issue is present in either case concerning the obscenity of the material involved."[1]

Since the obscenity of the material involved in the Roth and Alberts cases was not questioned, there was no occasion for the Court to specify, in any all-inclusive manner, what was *not* obscenity. It did define what it considered was obscene material, as we have noted.

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[1] "What the Roth case decided was: that obscenity is not within the area of constitutionally protected speech or press; that obscene material is defined as stated in the language which we have previously quoted; that in judging as to the existence of obscenity the test to be applied is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." The Court held that the statute here involved is stated in language sufficiently precise so as not to be offensive to the requirements of due process.

Although the Court at its next term issued a number of per curiam decisions[12] reversing courts of appeals' decisions holding certain material to be obscene with no more than citation of the Roth or Alberts cases, the definition of obscene material in Roth remains unaltered, and must be our guide. The wording of that definition sufficiently answers the suggestion that only "hard core pornography" may be made non-mailable.

If we are to consider appellant's point about obscenity being limited to "hard core pornography" we must under-

[12] Times Film Corp. v. City of Chicago, 355 U. S. 35, reversing 244 F. 2d 432 (7 Cir.); Mounce v. United States, 855 U. S. 180, reversing 247 F. 2d 148 (9 cir.); One, Inc. v. Olesen, 355 U. S. 371, reversing 241 F. 2d 772 (9 cir.); Sunshine Book Co. v. Summerfield, 355 U. S. 372, reversing 249 F. 2d 114, D. C. cir. In the Mounce case the Government confessed error. Apparently the Court considered that the court below had used the wrong test for it reversed and remanded the case to the district court for consideration of its holding in the light of Roth. In the other cases cited, the Court simply reversed the court of appeals and terminated the litigation. For an attempted explanation of these summary reversals see Collier v. United States, 4 cir., 283 F. 2d 780, 782: "Obviously Roth and Alberts were not overruled in the later decisions, whatever else they decided. Since no opinion was filed in these cases we have no precise guide to the reasons which actuated the Supreme Court other than the reasonable inference that the lower courts had not correctly applied the rule laid down in Roth. Examination of the opinions of the lower court shows plainly that portions of the materials were obscene in the judgment of intelligent and able men experienced in the finding and appraisal of fact, and the reversal of their conclusions is explicable to us only on the theory that they paid insufficient regard to the rule that in judging accused material attention should be directed not to detached and separate portions but to the whole material in its entire context. The material found by the trial and appellate courts to be obscene in each of these cases was only part of a publication devoted to the promotion of discussion of a particular idea such as the cult of nudism in the Sunshine case, or the subject of homosexuality in One, Inc. v. Olesen; or the material consisted of the adaptation of a book for moving pictures which disclosed illicit sexual relationships incident to the development of the plot, or the illustration of a thesis that the writer desired to expound, as in Times Film Corp. City of Chicago, supra."

stand what is meant by that term. In his separate opinion in *Kingsley Pictures Corp. v. Regents*, supra, at pp. 692-693, Mr. Justice Frankfurter quotes D. H. Lawrence on what he calls "genuine pornography".[13]

Certainly "hard-core pornography", which unquestionably would be obscene and non-mailable, would include pictorial and written descriptions of sex perversion and of degenerate bestiality. Such material, to the Roth case's "average person" is repulsive, loathsome and abhorrent. Such a person would describe it as nasty, foul, putrid and hideous. Concededly obscene, such material would scarcely come within the Court's definition of material "which deals with sex in a manner appealing to prurient interest", or as "material having a tendency to excite lustful thoughts." Quite the contrary. For that reason we think that the material such as that extracted from Peyton Place, which we have heretofore described, although it may not be "hard-core pornography", is nevertheless material which the jury could properly find to be obscene within the definition of the Roth case. Indeed, it would appear to be hard to find

[13] "But even I would censor genuine pornography, rigorously. It would not be very difficult. In the first place, genuine pornography is almost always underworld, it doesn't come into the open. In the second, you can recognize it by the insult it offers invariably, to sex, and to the human spirit. Pornography is the attempt to insult sex, to do dirt on it. This is unpardonable. Take the very lowest instance, the picture-card sold underhand, by the underworld, in most cities. What I have seen of them have been of an ugliness to make you cry. The insult to the human body, the insult to a vital human relationship. Ugly and cheap they make the human nudity, ugly and degraded they make the sexual act, trivial and cheap and nasty."

A rather full discussion of the commonly understood meaning of this term is to be found in Lockhart and McClure's article on "Censorship of Obscenity" in 45 Minn. L. Rev. 5, (Nov. 1960).

passages anywhere which exceed its appeal to prurient interest.

It is argued that there was not sufficient proof of scienter. Appellant concedes that the Court in *Smith v. California*, 361 U. S. 147, did not precisely define just what degree of scienter is required in a case of this kind. As appellant puts it, the Smith case "left dangling" this question. The argument is made here that it was necessary to prove not only that appellant knew the contents of the materials mailed, but that he must have had a specific intent to mail what he knew and believed to be obscene literature. Such a contention was rejected in *Rosen v. United States*, 161 U.S. 29, 41.[14]

Appellant cannot make that contention here, for he preserved no such point at the trial. The court charged otherwise, and there were no exceptions taken or objections made.[15]

Moreover, we think that there can be no doubt as to the sufficiency of the proof in this case no matter what view is taken as to the required proof of intent and knowledge. The circumstances surrounding the establishment and the conduct of appellant's mail order business was sufficient to

[14]For a suggestion as to why it must be rejected see Kalven, "Metaphysics of the Law of Obscenity," The 1960 Supreme Court Review, University of Chicago 1, 37.

[15]The court instructed the jury as follows: "If you find from all the circumstances that the defendant had knowledge of the contents of the advertisement with which he is charged with mailing or causing to be mailed, then he had knowledge within the meaning of the law no matter what he may have thought concerning the material; that is whether it was or was not obscene." Referring to appellant's claim that he never thought he was violating the law in any respect the court charged: "That is not his question, that is your question, members of the jury"

show not only that he knew the contents of the mailed material but he knew that he was engaged in the business of pandering to a taste for obscenity.[16]

Appellant testified that following some years of being in business with his brother which ended in failure he went to Florida and there began to look around for some way in which to make a living. He was broke. He tried operating what he called a "coin machine business"; he tried writing, but unsuccessfully; he tried selling ball point pens, also unsuccessfully, and then he thought of being a publisher. It occurred to him that mail order advertising was a promising way to get started making money without much capital, and that sex and sex education was not only important but one of the "best selling items in our society"; so he began advertising about 1958. He first advertised material appealing to women. This did not produce much. He then advertised material appealing to men, starting with some material entitled "Girl Getter" and then enlarging his advertisements and his mail order business and material, at-

[16] A contention similar to that made here was dealt with by the Court of Appeals for the Sixth Circuit in United States v. Oakley, 290 F. 2d 517, 519, (cert. den. 368 U. S. 888) as follows: "Defendant told of pictures seen by him while in the service. He introduced numerous publications and made reference to other media of information and entertainment currently available to the view of the public. He argues that his material was no worse than these. From his experience with these matters, he was persuaded, he says, that his enterprise was not illegal, and criminal intent was absent. We need not here pass upon the relative merits, or demerits, of defendant's wares and what may be obtained elsewhere. We decline to hold that contemporary sophistication has reached a point whereby to provide this defendant, or anyone else, with a license to prosecute the business of disseminating obscenity. It was for the jury here, under proper instructions and applying 'contemporary community standards' in the contest of defendant's conduct, to determine his guilt."

tempting to follow methods used by the big publishers, offering a line of materials and using mailing lists.

The short of it is that the appellant deliberately went into the business of selling material which the jury could properly conclude he chose to sell because, since it was material which dealt with sex in a manner appealing to prurient interest, it was a "best selling item". What he sold was, the jury would properly believe, simply dirt for dirt's sake, or as Mr. Justice Frankfurter suggested in the Kingsley Pictures case, supra, (p. 692) "dirt for money's sake"; — the jury could properly conclude that he was, in the words of Chief Justice Warren in the Roth case, supra (p. 496), "Plainly engaged in the commercial exploitation of the morbid and shameful craving for materials with prurient effect". The jury could hardly be blamed if they discounted his testimony at the trial that he was engaged in a high-minded educational enterprise.

The appellant also argues that he could not be prosecuted under Title 18, §1461, unless there had been previous determination that this material was non-mailable as provided in §§259 (a) and 259 (b) of Title 39 U.S.C. as the same were in effect prior to the return of the indictment herein. We find no basis whatever for this contention and reject it.

Appellant says that the question of obscenity is one of law, and not of fact, and hence not a matter properly to be submitted for jury determination; — that what is here involved is his claim of constitutional right, as a part of his First Amendment freedoms to distribute this literature. He says this can only be adjudged as a matter of law. In view of the Roth case and its express statement that the trial

court in that case "followed the proper standard" and "used the appropriate definition of obscenity" in its instruction to the jury, we think it is idle to contend that the question of obscenity was not properly submitted to the jury in this case.

We have sufficiently disclosed in what we have said so far that we think the evidence was such as to warrant the submission of the case to the jury. Of course the whole matter does not end there; for it is well settled that in any case in which there is a claim of denial of rights under the federal constitution an appellate court is not bound by the conclusions of the lower courts or of juries but will reexamine the evidential basis on which those conclusions are founded. *Napue v. Illinois*, 360 U.S. 264, 271.[17]

That case and the cases cited in it concern findings of state courts; but the same rule calling for reexamination of the evidentiary basis for such decisions is applied to findings by lower federal courts. *Leyra v. Denno*, 347 U.S. 556, furnishes an illustration of that sort of thing. The same approach was used by the Court of Appeals for the Second Circuit in *Grove Press Inc. v. Christenberry*, 276 F. 2d 433,

[17]The decisions to this effect are very numerous. Some of them are cited in Napue v. Illinois. Included is a citation of the dissenting opinion of Mr. Justice Harlan in Roth v. United States, supra, at p. 497, where it is stated: "I do not think that reviewing courts can escape this responsibility by saying that the trier of the facts, be it a jury or judge, has labled the questioned matter as 'obscene', or, if 'obscenity' is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind." The same principle was expressed for himself, Mr. Justice Frankfurter, and Mr. Justice Whittaker by Mr. Justice Harlan in his concurring opinion in Kingsley Pictures, supra, at p. 708. See also the separate opinion of Mr. Justice Frankfurter, pp. 696, 697.

436, where the court dealt with a finding by a Postmaster that a book was obscene within the meaning of 18 U.S.C. §1461. The court said: "Even factual matters must be reviewed on appeal against a claim of denial of a constitutional right." This duty of review on our part we fully recognize. We have examined the record here with that duty in mind. Our own independent examination of that record convinces us that the judgment based upon the verdict below presents no constitutional infirmity.

Finally, appellant seeks to argue the proposition that §1461 is unconstitutional, and that the Roth case was wrongly decided by a court wearing "judicial blinkers", that "Webster would have turned in his grave if he had known that obscenity had so many synonyms." Obviously, this is not the court to which such an argument should be addressed.

The judgment is

AFFIRMED.

(Signed) WALTER L. POPE

United States Circuit Judges

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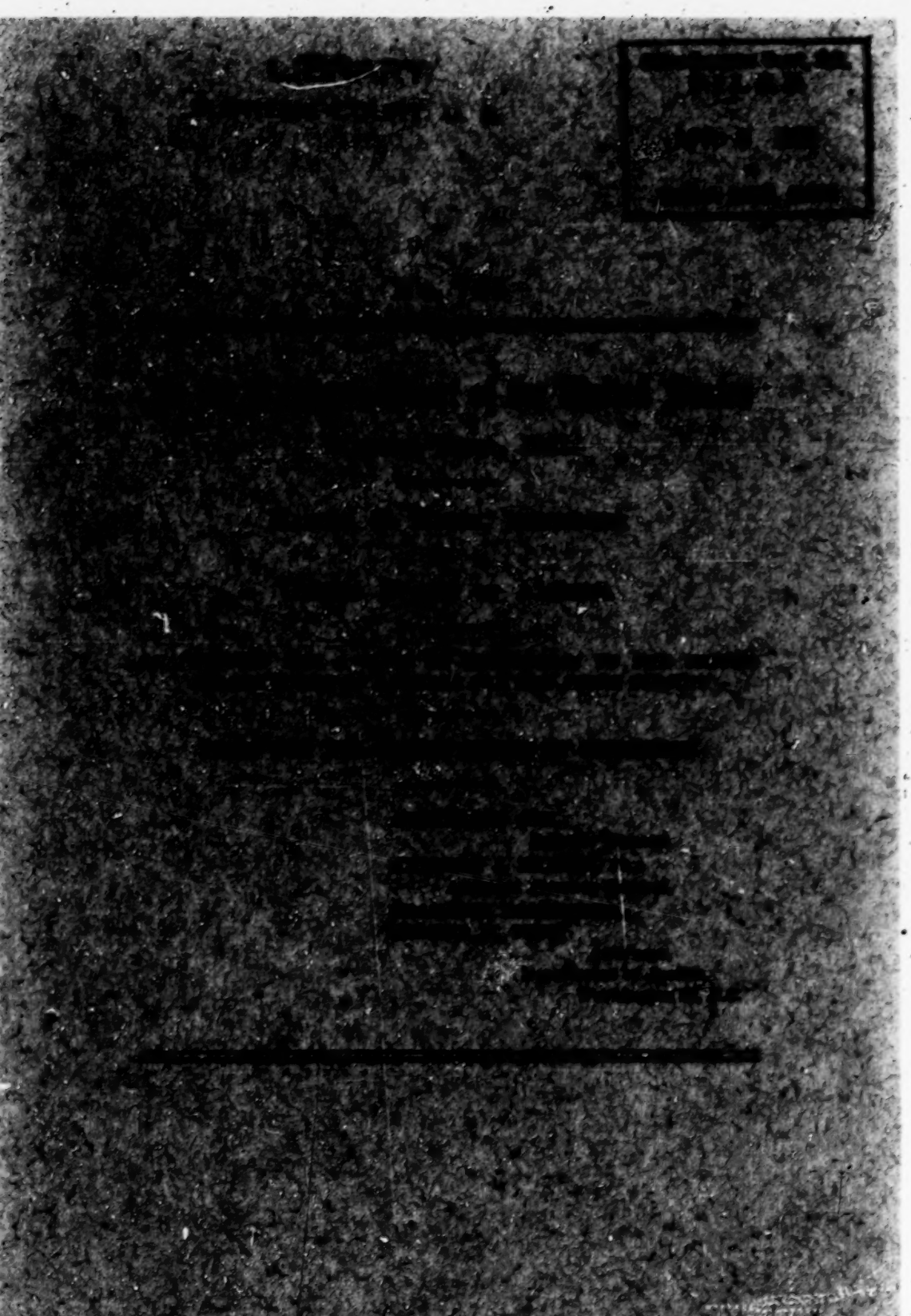

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 785

HAROLD S. KAHM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 457-75;[1] Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on February 9, 1962 (R. 476). The petition for a writ of certiorari was filed on March 8, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The record on file with the Clerk of this Court consists of a two-volume transcript, which is herein designated "R." Also on file with the Clerk are the original trial exhibits which were introduced by the government and the petitioner.

QUESTIONS PRESENTED

1. Whether the trial court correctly submitted to the jury the question of the obscenity of material petitioner was charged with having sent through the mails in violation of 18 U.S.C. 1461.

2. Whether the evidence of petitioner's knowledge and purpose in sending the allegedly obscene matter through the mails was sufficient to support his conviction.

3. Whether petitioner could be convicted of the offense of sending obscene matter through the mails where there had been no prior administrative determination by postal officials that such matter was obscene.

4. Whether 18 U.S.C. 1461, under which petitioner was convicted, is constitutional.

5. Whether this Court's decision in *Roth* v. *United States*, 354 U.S. 476, defining the standard of obscenity under 18 U.S.C. 1461, requires reexamination.

STATUTE INVOLVED

Section 1461 of Title 18, U.S.C., provides in pertinent part as follows:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—
>
> * * * * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters,

articles, or things may be obtained or made. * * *

* * * * * *

Is declared to be nonmailable matter * * *. Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter.

* * * * * *

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on each of nine counts of a ten-count indictment,[2] charging that he had knowingly distributed through the mails obscene "pamphlets, writings and publications" (counts 8, 9) and advertisements giving information as to where and how obscene mate-

[2] Count 1 was dismissed on the government's motion before the commencement of the trial (R. 434). Before all of the evidence was in on counts 8 and 9, the government sought to abandon them "solely for the purpose of limiting the trial * * *" (R. 178). However, after some discussion with the court, this motion was withdrawn (R. 179-82).

rial might be obtained (counts 2–7, 10), in violation of 18 U.S.C. 1461 (R. 2–7, 435). Petitioner was sentenced to 5 years' imprisonment on each count, the sentences to run concurrently; however, the sentences were suspended, and petitioner was placed on probation for their duration (R. 440–41). The court of appeals unanimously affirmed the conviction (Pet. App. A).

1. The evidence disclosed that petitioner conducted a mail-order business at Orlando, Florida, through which he solicited and filled orders, at prices ranging from $1.00 to $4.95 each, for pamphlets variously entitled "Sex for Single Men," "The Art of Seduction," "Sex Tortures," "Stag Limericks," "Sack's Book Reviews" and "Whizbangs" (R. 43–46, 59–63, 75–77). Unsolicited advertising circulars were mailed primarily to persons whose names appeared on mailing lists purchased by petitioner (R. 377–79, 389–91); among the addressees of these unsolicited advertisements were Arthur Richard Self, aged 15, of Cordell, Oklahoma (R. 96–100), and Donald Dittier, aged 18, of St. Louis, Missouri (R. 30–34). In response to test mailings by a postal inspector, certain of the pamphlets advertised in these circulars were sent through the mails, providing the basis for counts 8 and 9 (R. 5–6, 103–07, 111–13, 185–203).

2. The mailings on which counts 8 and 9 were based contained, among other things, the pamphlet, "Sack's Book Reviews," and the mailings on which counts 2–7 and 10 were based contained a brochure in which that pamphlet was advertised. The pamphlet was composed simply of selected excerpts from published

books, such as *Peyton Place* by Grace Metalious; there was no continuity or relationship among the excerpts except that each was a detailed description of individuals engaging in sexual activities, in some instances heterosexual and in others homosexual (R. 113–31). The advertising material described the pamphlet as containing "the sizzling hot pages concealed among the 80,000 words of many seemingly innocent novels. The authors haven't missed a trick: rape, seduction, homosexuality, Lesbianism, perversions, gang orgies, wrestling, kicking, biting, whipping, caressing, beating, moaning—all the writhing, bare bedroom facts of life in heartpounding detail are here" (R. 59).

The count 8 and 9 mailings also contained the pamphlet, "Sex Tortures," and the count 2–7 mailings also contained advertisements for this pamphlet. The pamphlet described in detail various methods of inflicting physical pain upon the genital organs of the victims (R. 196–203). According to the advertisements, it contained "sex tortures of the most horrible kind * * * inflicted upon the helpless, bound naked bodies of male and female victims. All described in picture-clear detail" (R. 59). The mailings on which counts 2 through 10 were based also contained various others of petitioner's publications or advertisements for them.

3. A psychiatrist appearing on behalf of the government[1] testified that "the full effect" of "Sack's Book Reviews" would be to arouse the prurient interest of

[1] This witness appeared as part of the government's rebuttal case.

the normal reader (R. 403; see also R. 402); he said that the way in which these suggestive excerpts were massed made them particularly stimulating (R. 414) and that one of them, at least, would have a greater tendency to arouse the average reader than, for example, a picture of a nude woman displaying her pubic area (R. 407). He testified that the impact of "Sex Tortures" on the average reader would be one of "horrid fascination" but with "a sexual component" resulting from the fact that "torturing and suffering of pain" are "necessary for the complete gratification of a sex desire in many people" (R. 403–04). He further testified that even the advertisements were sexually stimulating in and of themselves (R. 401).

A sociologist called by the defense, while testifying that narrative material is generally less stimulating sexually than pictures (R. 297), conceded that it was "highly possible" that a person could find "Sack's Book Reviews" sexually stimulating (R. 272), that it might well arouse "lustful thoughts" in the average person (R. 273), and that some portion of it "might prove sexually stimulating to a great degree" (R. 283; see also R. 270–71, 298). He also testified that this publication would be more likely to arouse the prurient interest of a young man than of an older man (R. 277; see also R. 284).

The defense was permitted to introduce, or to have the expert and lay witnesses compare with petitioner's publications, a variety of material generally available to the public, including so-called "girlie" magazines, nudist magazines, paper-back books (such as *Peyton*

Place, *Lady Chatterley's Lover*, and a number of books dealing with sex tortures), advertisements for motion pictures, and some admittedly "hard core" pornography (R. 255-59, 313-14, 322-26, 332-35, 387-88). The defense psychiatrist testified that the magazines, books and advertisements were more stimulating sexually than petitioner's publications (R. 255, 256, 258, 259); the government's psychiatrist testified that such material was no more stimulating than petitioner's publications (R. 412-13).

4. Petitioner testified in his own defense that he first went to Orlando, Florida, in 1957 (R. 223), and, after having engaged in several unprofitable business ventures (R. 233-36), decided to enter the mail-order business in printed material concerning sexual matters (R. 236-46). He stated that financial considerations played an important part in his decision to enter this business (R. 368-69), noting that sex "is one of the best selling items in our society * * *" (R. 238; see also R. 345, 372). He testified that at first he made little money in this venture (R. 246), but then he obtained a mailing list of "names and addresses of people who had purchased somewhat similar material, Sex Books, Party Records, and all sorts of things" (R. 336). He testified that his income "shot up enormously when I started using these" (R. 390; see also R. 246).[*] Petitioner indicated that he published "Sack's Book Reviews" primarily because he thought it would be profitable (R. 311); although he admitted

[*] The government's evidence showed that petitioner had received some $1,700 in proceeds from this mail-order operation in the last eight-to-ten days preceding his arrest (R. 175-76).

that the excerpts of which the pamphlet was composed were not "book reviews" in the ordinary sense, his justification for so designating them was that their purpose was to inform the readers that each of the books covered "does deal with sex" (R. 372).

Petitioner testified that, except for the limericks, "humor" and "book reviews," he himself had written most of the material he published (R. 247–48). He conceded that he had printed and mailed the pamphlets and advertisements that were the subject of the indictment (R. 245, 247, 315, 308–09, 370–71), but testified that he had conducted his business openly (R. 315, 335) and that he did not believe the material he was mailing was obscene (R. 335, 340). He said that he did not intentionally send material to minors (R. 388) and that it was "a shock and a surprise" for him to learn that material he was mailing did go to minors (R. 390).

5. The trial court instructed the jury on the standard it was to apply in determining obscenity, in pertinent part, as follows (R. 426–27):

> Gentlemen of the jury, you are * * * instructed that you are not to consider the patched or separate portions of the material in question in determining obscenity. But you are to judge the material as a whole in its entire context.
>
> * * * The test of obscenity is whether to the average person and applying present day standards throughout the nation, the dominant theme of the material as a whole, in question, appeals to the prurient interest. By the term prurient

> is meant itching, longing, uneasy with lewd or morbid desire or longing. * * *

The jury was instructed that it could consider the defense evidence introduced "to show that certain material and books are openly sold in the Orlando community" but that they as jurors were to determine "what the contemporary community standards are and, apply those standards in arriving at your decision" (R. 425).

ARGUMENT

It is difficult to determine from the score or so "questions" and subquestions the petition presents (Pet. 2–5) and from the undifferentiated argument thereon (Pet. 10–13) precisely what issues petitioner would have this Court review. The contentions on which he appears to place the most reliance are (1) that the issue of whether the material in question was obscene should not have been submitted to the jury, (2) that there was no evidence as to petitioner's state of mind sufficient to convict him of these charges, (3) that there should have been an administrative determination by postal officials as to the obscene character of the material in question before petitioner was criminally charged with having mailed it, (4) that 18 U.S.C. 1461, under which petitioner was convicted, is unconstitutional, and (5) that the case of *Roth* v. *United States*, 354 U.S. 476, was wrongly decided by this Court. There is no merit to any of these contentions nor to any of the host of other arguments advanced in the petition.

1. Petitioner contends that the issue of obscenity should not have gone to the jury for two reasons: first, because the government "offered no proof of obscenity whatsoever" (Pet. 8; see also Pet. 2, 7, 10), and, second, because such an issue can be submitted to the jury only when the material is obscene "as a matter of law" (Pet. 11; see also Pet. 3, 12). Since the sentences upon all the counts on which petitioner was convicted run concurrently, it is appropriate to consider this contention (as the court of appeals considered it, Pet. App. 5) in relation to the "pamphlet" counts (8 and 9) alone, without consideration of the "advertising" counts. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359; *Hirabayashi* v. *United States*, 320 U.S. 81, 85.[5]

In its case-in-chief, the government introduced the pamphlets on which counts 8 and 9 were based; indeed, two of them were read aloud to the jury (R. 113–31, 196–203). In addition, the government introduced petitioner's own descriptions, in his advertising circulars, of these pamphlets. As the court below found (Pet. App. 10–11), no sophisticated analysis or expert guidance was necessary for the jury to be able to judge the obscenity of this material as a whole in relation to community standards. It had

[5] Petitioner's unsupported assertion (Pet. 4) that such analysis is improper is, of course, without merit.

[6] For the same reason, it is unnecessary to consider the alleged "conflict" (Pet. 3, 10) between *United States* v. *Hornick*, 229 F. 2d 120 (C.A. 3) and a district court case, *Voss* v. *Christenberry*, 179 F. Supp. 411 (S.D.N.Y.), which are concerned only with the portion of 18 U.S.C. 1461 punishing the mailing of information as to where obscenity may be obtained.

an ample basis in the pamphlets themselves to find them obscene. Moreover, when petitioners contested this evidence with the testimony of a sociologist, the government in rebuttal introduced expert psychiatric testimony to shed additional light on the obscene character of the material. In short, the government amply met its burden under the statute in relation to the obscenity issue.

There is no basis whatever for petitioner's novel contention that the issue of the obscenity of challenged material may be submitted to the jury only when the judge finds it obscene "as a matter of law." As the court below observed (Pet. App. 17–18), it is clear from this Court's decision in *Roth* v. *United States*, *supra*, 354 U.S. at 486, 489–90, that the obscenity issue in a prosecution under 18 U.S.C. 1461 is a question of fact for determination by the jury (assuming, of course, that in any particular case reasonable men may differ as to whether the material is obscene[1]). See also, *e.g.*, *Rosen* v. *United States*, 161 U.S. 29, 42–43; *Parmelee* v. *United States*, 113 F. 2d 729, 731 (C.A.D.C.); *United States* v. *Dennett*, 39 F. 2d 564, 568 (C.A. 2).

2. Petitioner contends that his conviction was defective because there was insufficient evidence of *scienter* or *mens rea* on his part (Pet. 2, 3, 7, 10, 12). Petitioner conceded that he was aware of the contents of the pamphlets he mailed; indeed, he admitted that he wrote or compiled them himself. Hence, no problem of *scienter* is raised under *Smith* v. *Cali-*

[1] Petitioner concedes that the *Roth* case so held (Pet. 3).

fornia, 361 U.S. 147. Petitioner bases his contention on his testimony that he did not believe this material was obscene. As this Court has held, that is no defense even if true, for "[e]very one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age * * * must be deemed obscene, lewd and lascivious." *Rosen* v. *United States*, *supra*, 161 U.S. at 42; see also *Roth* v. *United States*, *supra*, 354 U.S. at 491. Moreover, the character of the material petitioner disseminated, and the evidence that he was engaged in the business of publishing non-educational sex literature primarily for pecuniary gain and that he obtained and employed special mailing lists of persons who had purchased such matter, provided an ample basis for the jury to disbelieve petitioner's protestation that he did not know this material was obscene.

3. Similarly lacking in merit is petitioner's argument that his conviction is invalid because there had not been a "prior determination of obscenity" by means of the "postal administrative machinery" (Pet. 5, 9; see also Pet. 3–4, 11). Apparently petitioner contends that, before he can be criminally charged with having sent obscene matter through the mail, the Post Office Department must have conducted a mailability proceeding in which it found the matter obscene. As the court below concluded (Pet. App. 17), there is no basis, either in the statute or in the case law, for such a contention. The interdiction of 18 U.S.C. 1461 and 39 U.S.C. Supp. III, 4001 against the carrying of obscene matter in the mails, and the postal

procedures thereunder for determining mailability, are entirely separate and distinct from the criminal offense of mailing obscenity. Congress plainly did not intend, nor has any court ever suggested, that the administrative procedure is a prerequisite to the criminal procedure (or vice versa); for example, no administrative determination preceded the criminal conviction for mailing obscenity that was affirmed by this Court in *Roth* v. *United States*, *supra*.

4. Petitioner's challenge (Pet. 5, 11, 12) to the constitutionality of 18 U.S.C. 1461 is not entitled to serious consideration. As petitioner concedes (Pet. 10, 11), the constitutional validity of the criminal provisions of that statute were sustained by this Court in *Roth* v. *United States*, *supra*, 354 U.S. at 492. Petitioner advances no argument against the statute that either was not disposed of in the *Roth* case (*e.g.*, that the statute is unduly vague; Pet. 5, see 354 U.S. at 491–92) or is not plainly frivolous (*e.g.*, that the statute "attempts to regulate matters other than obscene matters" and that "it is in the nature of an ex post facto law or bill of attainder," Pet. 5).

5. The trial court properly instructed the jury on the correct standard for determining obscenity, as laid down by this Court in *Roth* v. *United States*, *supra*, 354 U.S. at 487 (see pp. 8–9, *supra*). However, petitioner contends that the *Roth* case was incorrectly decided. The bases for this contention are varied—that the Court "employed conflicting definitions of obscenity" (Pet. 2–3), that the Court erred in holding "obscenity to be a matter of fact" (Pet. 3) (see p. 11,

supra), that the Court's decision "amounts to judicial legislation" (Pet. 5), that it "left some very serious questions unanswered and created some new ones" (Pet. 10), and that it "gave * * * impetus to censorship activities" (Pet. 12). None of these claims is supported in any way, nor is there the slightest merit to any of them. Petitioner has suggested no valid reason for the Court to reexamine the *Roth* decision.

6. The remaining contentions in the petition are far too lacking in merit to warrant extensive treatment. The claims of error in relation to the burden of proof and the presumption of innocence (Pet. 2, 10–11) are fully refuted by the record (see, *e.g.*, the trial court's charge, R. 423–24). The alleged conflicts in decision that are suggested (Pet. 3, 10), but are never spelled out, are either irrelevant (see n. 6, *supra*) or nonexistent. The claim that there was some defect in the jury's consideration of "community standards" has no warrant in the record; petitioner was given wide scope in introducing evidence on that subject (see pp. 6–7, *supra*), and the trial court correctly instructed the jury in that regard (see p. 9, *supra*). Finally, the suggestion that the court of appeals was biased against petitioner (Pet. 4; see also Pet. 10) is utterly gratuitous and without any foundation.

CONCLUSION

Petitioner has raised no issue warranting review by this Court. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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